In the Supreme Court of the United States

October Term, 1975

No. 75-1330

Dorcea Mielke, et al.,
Petitioners,
v.
Singara Grotto, Inc., et al.,
Respondents.

PETITION FOR REHEARING

Petitioners respectfully request this Honorable Court to reconsider its order denying Writ of Certiorari in Dorcea Mielke, et al., Petitioners, v. Singara Grotto, Inc., et al., Respondents, Case Number 75-1330.

The Constitution of the State of Ohio provides that the right of trial by jury shall be inviolate. The question presented in the instant case is whether, once the state accords its citizens this right, the courts of that state are thereby bound by the mandates of the Seventh Amendment to the United States Constitution, prohibiting trial and appellate courts from re-examining the facts found by the jury otherwise than according to the rules of common law.

The decisions of the Supreme Court to date do not answer this significant constitutional question. *Walker v. Sauvinet*, 92 U.S. 90 (1875), decided over a century ago, is the closest case in point. Cited often in the past one hundred years, it has never been expressly re-examined. *Walker*, supra, as noted in Petitioners' Petition for Writ of Certiorari,is distinguishable from the instant case in several notable respects. In light of this Court's recent enlightened decisions in the area of Fourteenth Amendment due process, overruling previous *Walker*-era holdings, a judicial re-examination of the foundation of the *Walker* decision is necessitated. The instant case presents an excellent opportunity for such a review, in a ruling which affirms the fundamental nature of the Seventh Amendment.

The case of the Petitioners involved a products liability case where the Defendant, Purex, Inc., manufactured an ultra-hazardous highly slippery floor wax. Even the expert witnesses of the Defendant Purex admitted that its product, called Triple Life, lacked the necessary chemicals to make it a safe and non-slippery floor wax. They also admitted that many of the batches of Triple Life floor wax were unsafe. The expert witness of the Petitioners was an outstanding chemist who demonstrated why the failure to have chemical components, such as silica, caused the floor wax to be defective; that is, slippery. The jury had proper instructions of the law of Ohio; and following those instructions, the jury found as fact that the Triple Life floor wax was defective.

The application of product liability to a floor wax is novel. The trial court was personally unable to accept the developing law of product liability at least to the extent that it would apply to a slippery floor wax.

BLEED THROUGH

The trial court, prior to the jury verdict, overruled Purex, Inc.'s motion for a directed verdict, as the trial court ruled that there was ample evidence to support a jury verdict and that reasonable minds could differ as to whether or not a defective product had been proven.

Hence, the trial court not only overturned the jury verdict of one quarter of a million dollars but also granted a judgment notwithstanding the verdict on the completely irreconcilable bases that (a) no defect was shown, and (b) that the permanently injured Plaintiff assumed the risk. Even the Court of Appeals, in its decision, recognized that the trial court was re-examining facts "found and agreed upon by the jury otherwise than according to the rules of common law." The Court of Appeals stated, "Plaintiffs assert with some logic that a finding of assumption of the risk is not consistent with the holding of the trial court that there was no defect." This opinion is published in Appendix B of the Petitioners' Petition for Writ of Certiorari.

Recognizing that the trial court did unconstitutionally re-examine the facts found by the jury otherwise than according to common law, the Court of Appeals then conducted its own unconstitutional re-examination which was different from that of the trial court, and which was on bases of law contrary to the instructions given to the jury, and which was the second re-examination otherwise than according to the rules of common law. The Court of Appeals, once it recognized the constitutional infirmity of the trial court's re-examination of the facts otherwise than according to the rules of common law, should have reversed the judgment notwithstanding the verdict and reinstated the jury verdict or, at the very least, ordered a new trial.

The time of the Honorable United States Supreme Court is valuable and is limited, but this is certainly a case that cries out for its review. The Petitioners believe that their construction of the meaning of the re-examination provision is the correct construction. But correct or incorrect, what is important is that the United States Supreme Court has never spoken to just what the re-examination provision does mean. There is no question that in not only overturning the jury verdict but in also granting a judgment notwithstanding the verdict that the trial court did indulge in "re-examining the facts found by the jury otherwise than according to the rules of common law." The appellate court conceded that the trial court did so. This ought to put the question squarely before the United States Supreme Court to interpret the constitutional provision and give real meaning and substance to this neglected part of the United States Constitution.

Respectfully submitted,
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CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing Petition for Rehearing was sent by regular U.S. mail, postage prepaid, to Foster J. Fludine, Counsel for Respondents, at 440 Leader Building, Cleveland, Ohio 44114, this day of June, 1976.

Ronald Culp